No.

FILED
OCT 10 1968
JOHN F. DAVIS, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CHARLES H. TOMPKINS COMPANY and L. A. JONES CONSTRUCTION COMPANY, Joint Venturers, *Petitioners*,

v.

LLOYD E. MITCHELL, INC.; HARRY ALEXANDER, INC.; and E. C. ERNST, INC., Joint Venturers, *Respondents*.

BRIEF OF RESPONDENTS HARRY ALEXANDER, INC. AND E. C. ERNST, INC., JOINT VENTURERS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHASE AND MCGARVEY

By: Nicholas J. Chase

Robert W. McGarvey

A. Kenneth Pye

1710 Wilson Building

Washington, D. C.

and

Robert A. Hess

Investment Building

Washington, D. C.

Counsel for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

CHARLES H. TOMPKINS COMPANY, and J. A. JONES CONSTRUCTION COMPANY, Joint Venturers, *Petitioners,*

v.

LLOYD E. MITCHELL, INC.; HARRY ALEXANDER, INC., and E. C. ERNST, INC., as Joint Venturers, *Respondents.*

BRIEF OF RESPONDENTS HARRY ALEXANDER, INC., AND E. C. ERNST, INC., JOINT VENTURERS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

May a general contractor through the guise of an action in interpleader create a fictitious case between two subcontractors when neither subcontractor asserts any claim against the other or against the general contractor and where no fund exists to which the subcontractors are claiming?

STATEMENT OF THE CASE

Petitioner, a general contractor, entered into a contract with the Corps of Engineers, United States Army, for the construction of work at Fort Meade, Maryland. Following the submission of a bid by Respondent, Alexander-Ernst, Petitioner indicated its intention to let the electrical work to them. In negotiations prior to the execution of a written contract, a dispute arose concerning whether certain work known as "motor control" devices was included in the electrical subcontract to be performed by Alexander-Ernst, and it was determined that this work should not be included, as indicated by Petitioners' own letter of October, 1955. (J. A. 54).

During the performance of the electrical subcontract, a dispute arose between Respondent Mitchell, Inc., the mechanical subcontractor as to whether certain work including the "motor control" devices should be performed by that Company under its subcontract (J.A. 7, 54, 63, 70). Petitioner insisted that such work should be performed by Respondent Mitchell, Inc. and it was (under protest). Mitchell, Inc. demanded arbitration (J.A. 63, 70, 74). Petitioner made a cross-demand for arbitration upon Respondent Alexander-Ernst (J.A. 76). Despite the fact that Respondent Alexander-Ernst had no dispute with either Petitioner or Respondent, Mitchell, Inc., it was required to participate in the arbitration in order to protect its interest (J.A. 79, 80). The arbitrators decided that Alexander-Ernst was not a proper party to the arbitration and held that Mitchell, Inc. was not obligated to perform the work (J.A. 83).

Petitioner thereafter demanded that Alexander-Ernst assume the obligation to pay for this work (J.A.

85). A second arbitration was held in which it was determined that Respondent Alexander-Ernst was not obligated to perform the work (J.A. 94). Meanwhile, Mitchell, Inc. had performed the disputed work and had been paid for same. Petitioner then proceeded to back-charge both Respondents for the cost of the work performed on the "motor control" devices on its books and retained funds which would otherwise have been paid to Respondents for other unrelated work performed on the project (J.A. 10, 56, 57, 123).

Petitioner brought an action in the United States District Court for the District of Columbia seeking to interplead the Respondents and seeking to pay into the registry of the court money owed to the subcontractors for work performed other than the disputed work. The United States District Court granted Respondents' Motions for Summary Judgment. The United States Court of Appeals for the District of Columbia affirmed the decision of the lower court in a unanimous decision.

The foregoing factual recitals have been made in the interest of clarity and accuracy.

ARGUMENT

1. Two arbitration boards have held that neither Respondent, Mitchell, Inc., nor Respondent Alexander-Ernst, Inc. undertook to perform the disputed work. As the Court of Appeals pointed out, Petitioner is clearly bound by those awards. Petitioner did not challenge the validity of these awards in its Complaint in the United States District Court. Petitioner now seeks to have this Court collaterally attack the arbitration awards which it has never directly attacked and relitigate questions of fact which have been con-

sistently determined against it by all forums before whom the matter has been submitted for consideration. No precedent exists for such action.

Petitioners' case is pitched upon the factual claim that the work which was in dispute must necessarily have been part of the obligation of Respondent Mitchell in the mechanical subcontract or of the Respondent Alexander-Ernst as part of the electrical subcontract. This proposition has been argued and tried as a factual issue, has been disputed as such by both respondents and has been determined against Petitioners.

Petitioners argue that they must be correct in the foregoing position because Respondent Mitchell undertook to perform "all of the so-called mechanical work" and Respondent Alexander-Ernst undertook to perform "all of the so-called electrical work". This, too, was a factual issue in the earlier proceedings and Petitioners neglect to recite the fact that there was evidence showing that this claim was also unfounded. But this really is the same point previously discussed, simply presented in a somewhat different way.

After arguing all of the same points which are presented in this petition before two arbitration panels and having been rejected on both occasions, Petitioners went before the United States District Court and filed an action in interpleader, totally ignoring the arbitration awards, making no challenge to the validity of said arbitration awards, and took the position that it was a disinterested stakeholder caught between conflicting claims of two subcontractors. Thereafter, when the Respondents herein come forward with the contention that neither Respondent was claiming the alleged fund made up of monies due for

so-called disputed work and pointed out that the work had actually been performed by Respondent Mitchell, and paid for by Petitioner, and, that the only funds in the hands of Petitioners were due for other work not in dispute, Petitioners claimed that the arbitration awards involved were invalid. A complete record was developed by the parties going to the validity or invalidity of the arbitration.

The United States District Court held that this was no proper situation for an interpleader action and it granted a summary judgment to Respondents, denying Petitioners' Motion for Summary Judgment. The Court of Appeals fully agreed with this and, in view of the evidence which the District Court had had before it, added, in substance, that even if some relief other than interpleader might have been appropriate under some facts, "the facts developed in the evidence conclusively show, not only that an action in interpleader was improper, but also that the appellant were not entitled to any other sort of relief, so Rule 54(c), Federal Rules of Civil Procedure, does not apply."

2. Petitioner is not a disinterested stakeholder caught between conflicting claims of two subcontractors. There has never been any dispute between Respondents. The only disputes between Respondents and Petitioner were decided against Petitioner in the two arbitration proceedings. The "fund" held is simply money owed to Respondents for unrelated work. Hence, none of the essential prerequisites for an Action of Interpleader are present.

3. Even if it is assumed that the District Court should have considered the validity of the arbitration awards in acting on Petitioner's Action of In-

terpleader, the record establishes that no serious challenge to the validity of the awards could have been made. Hence, as Petitioner was not entitled to any type of relief, Rule 54 (c) of the Federal Rules of Civil Procedure clearly was inapplicable.

4. An examination of the authorities cited in the Petition will quickly expose the error of the contentions made by Petitioner that the decision in the instant case conflicts with the decisions of this Court or with the decisions in the other circuits.

5. It is clear that the decision below is correct; it does not conflict with the decision of another court of appeals; it has not decided any state or territorial question in a way in conflict with applicable state or territorial law; it has decided no Federal question which should be settled by this Court; it has not decided any question in any way which conflicts with applicable decisions of this Court; it has not departed from the accepted course of judicial proceedings or permitted such a departure by a lower court as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

CHASE AND MCCHESNEY

.....

By: NICHOLAS J. CHASE
ROBERT W. MCCHESNEY, JR.
A. KENNETH PYE
1216 Wyatt Building
Washington, D. C.
and

.....

ROBERT A. HEXDON
Investment Building
Washington, D. C.

Attorneys for Alexander-Ernst